speculation or investment in stock. Where the investment in a building corporation is a reasonable and *bonâ fide* method of acquiring banking quarters, it seems difficult not to support the transaction as an exercise of implied incidental powers. Although in a like manner other corporations are prohibited from investing in stock, it has been held that a railroad company may purchase the majority interest in a corporation engaged in business which the railroad is authorized to transact,[19] and that a cloth manufacturing and bleaching company may buy stock in a corporation producing the dyes used in its manufacturing process.[20] Where a corporation may achieve a purpose directly, the power to perform indirectly would seem reasonably incidental, unless some principle of public policy were violated by the method of accomplishment.

It is true that the purchase of less than a controlling interest may be objectionable on the ground that the funds of the bank are thus placed beyond the control of its directors. On the other hand, the situation in the principal case so closely resembles a loan that the transaction can hardly be open to criticism on mere grounds of policy. For the bank obtained from the promoter, at the time of its purchase of the stock, a promise to buy at par value, and received security for the performance of this obligation.

THE TORT LIABILITY OF A CONTRACTOR FOR NEGLIGENT WORK ON COUNTY ROADS. — It has been a great matter of litigation how far public bodies are liable in tort with respect to their duty to maintain and repair highways. Whatever answer the courts may give to that question, the tort liability of individuals who are prosecuting the public work should be sharply distinguished. A recent case in Kentucky, however, lays down the rule that a highway contractor is not liable for positive misfeasance, because his employer, the county, is immune from suit. *Ockerman* v. *Woodward*, 178 S. W. 1100.

In England, under the common law, the duty to repair roads was imposed on the parish,[1] the duty to repair bridges on the county.[2] For the failure to perform this obligation, an indictment lay against the inhabitants of the parish or the county.[3] Yet an individual who suffered special injury through the defective condition of the bridge out of repair was denied recovery against the county in the leading case of *Russell* v. *Men of Devon*.[4] While the principle upon which the case is to be rested has received frequent and varied treatment, it has been generally followed in England and in this country, where either a county, parish, or town was by statute or common law under a duty to repair a bridge or high-

[19] State *v.* Missouri, etc. Ry. Co., 237 Mo. 338, 141 S. W. 643. But see *contra*, People *v.* Pullman Car Co., 175 Ill. 125, 159, 51 N. E. 664, 676.

[20] Joseph Bancroft & Sons Co. *v.* Bloede, 106 Fed. 396.

[1] COM. DIG., tit. Chimin A 4, vol. II, 398; 1 BL. COM., 357.

[2] COM. DIG., *ibid.*, B 2, vol. II, 399; 1 BL. COM., 357; 2 COKE, INST., 700.

[3] COM. DIG., tit. Chimin A 4, B 3; 1 BL. COM., 357; King *v.* Inhabitants of Devon, 14 East 477.

[4] 2 D. & E. 667.

way.[5] The result in that case and in the cases which follow it should rest on the ground that the so-called quasi-corporation is performing a public duty for the benefit of everyone, and is receiving no special benefit of any kind in return. Though *Russell* v. *Men of Devon* might have been decided on the ground that there was no corporation to sue, and that there was no corporate fund out of which the damages could be paid, such grounds will not suffice to explain later cases where counties, parishes, or towns were incorporated and had treasuries of their own.[6] Nor will an explanation be found in the principle that the breach of an affirmative public duty gives rise to no private action unless legislation gives the remedy.[7] For this would lead to a distinction between misfeasance and non-feasance, which neither the original case nor later decisions will support.[8] Whether an injury occurs through the failure to repair, or through negligence in repairing,[9] no recovery should be allowed against

[5] Hedges *v.* County of Madison, 6 Ill. 567; Town of Waltham *v.* Kempner, 55 Ill. 346; Mower *v.* Leicester, 9 Mass. 247; Sargent *v.* Guilford, 66 N. H. 543; Altnow *v.* Sibley, 30 Minn. 186; Board of Commissioners *v.* Allman, 142 Ind. 542; McKinnon *v.* Penson, 8 Ex. 319; Young *v.* Davis, 7 H. & N. 760, 2 H. & C. 197; Gibson *v.* Mayor of Preston, L. R. 5 Q. B. 218; Parsons *v.* St. Matthews Vestry, L. R. 3 C. P. 56; Maguire *v.* Liverpool Corporation, L. R. [1905] 1 K. B. 767. *Contra*, Dean *v.* New Milford Township, 5 W. & Ser. (Pa.) 545; Humphreys *v.* Armstrong Co. 56 Pa. St. 204; County Commissioners *v.* Duckett, 20 Md. 468.

[6] Russell *v.* Men of Devon was placed on this ground in McKinnon *v.* Penson, 8 Ex. 319, 327. That the real ground of the decision went further than this formal requirement is shown by the decision in that very case. Although the statute of 43 GEO. III, ch. 59, permitted the county to sue and be sued in the name of the surveyor, and though the county had funds, yet no right of action was said to exist against the county for an injury resulting from the defective condition of the bridge. In accord, with regard to parishes, under a similar statute, Young *v.* Davis, 7 H. & N. 760. See also Vaughan Williams, L. J., in Maguire *v.* Liverpool, L. R. [1905] 1 K. B. 767, 787; and Halsbury, L. J., in Cowley *v.* Newmarket, [1892] A. C. 345, 350. In Commonwealth *v.* Mighels, 7 Oh. St. 109, Markey *v.* Queens County, 154 N. Y. 675, and Commonwealth *v.* Allman, 142 Ind. 542, the county was not held even though it was incorporated and had funds. In the cases holding counties liable, cited in note 5, such facts were held to distinguish Russell *v.* Men of Devon.

[7] For a thorough discussion of this principle, see an article by the late Prof. E. R. Thayer, "Public Wrong and Private Action," in 27 HARV. L. REV. 317, 320, 329 *et seq.*

[8] A city is not liable for the negligent acts of its officers or employees in maintaining or repairing school buildings. Bigelow *v.* Randolph, 14 Gray (Mass.) 541; Howard *v.* Worcester, 153 Mass. 426; 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1688. Nor is a city liable for the negligent acts of its employees in the police, fire, health, or parks department. Blair *v.* Granger, 24 R. I. 17; Louisville Park Comm. *v.* Printz, 127 Ky. 460; Orr *v.* Lansing, 35 Ia. 495; Bowditch *v.* Boston, 101 U. S. 16; 4 DILLON, MUNICIPAL CORPORATIONS, §§ 1656, 1660, 1661.

[9] It may appear at first sight that the English cases support such a distinction. Freeman *v.* Canterbury, L. R. 6 Q. B. 214; Taylor *v.* Greenhalgh, L. R. 9 Q. B. 487; Pendlebury *v.* Greenhalgh, 1 Q. B. D. 36; Parsons *v.* St. Matthews Vestry, L. R. 3 C. P. 56, 59, 60; and Cowley *v.* Newmarket, [1892] A. C. 345, appear to lay down such a rule. But thorough examination of these cases will show no disagreement with the conclusion above stated. Originally no single individual was charged with the duty of repairing roads. The Stat. of 2 & 3 PH. & M., ch. 8, directed the church wardens of each parish to elect two surveyors to mend the highways. Under the Stat. of 4 & 5 WM. IV, ch. 50, the surveyors were given the duty to maintain and keep in repair highways within their respective parishes. Generally throughout England the position of surveyor has been abolished and the "duties, rights and responsibilities" of that office have by various statutes been vested in town and district councils or some other such corporation. The cases making the distinction between misfeasance and non-feasance are cases where the duty of surveyors was transferred to public bodies. Just as the surveyor was liable for his misfeasance, so are the bodies succeeding to his duties and

a county, township, or parish. It is the special nature of the duty which gives the immunity from private suit.[10]

The immunity of the public corporation should not extend, however, either to employees or to independent contractors whom the town or county has intrusted with the carrying out of its duty. And here the distinction is properly made between misfeasance and non-feasance, just as in the English case dealing with the liability of surveyors of highways or of those bodies which have been substituted in their place.[11] The contractor or the employee owes an affirmative duty only to the county or city employing him, and from his mere failure to repair, whatever may be his liability to his principal, no action should lie against him by an individual.[12] But no reason is apparent why the contractor should be relieved of his ordinary duty of careful conduct with reference to others likely to be injured by his negligence.[13] The court in the principal case[14] feared that holding the contractor liable would defeat the immunity of the county because in the long run the burden would fall upon the county, by reason of the higher price which contractors would charge. If this be so of the contractor, why not also of the railway which hauled the asphalt or rock, of the truckman who hauled the rock for the contractor, of the manufacturer who constructed the tools which the contractor uses, and of the numberless others who contribute to repairing the road? Certainly the contingency of future lawsuits cuts little or no figure in a contractor's estimate for private work, and it is somewhat fanciful to suppose that the county would be caused substantial detriment on this account. Indeed, the county would probably suffer more under the

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liabilities, though the failure to repair is solely a breach of public duty. See Pollack, C. B., in Davis *v.* Young, 7 H. & N. 760, 771; Channell, B., *ibid.*, 776; and Willes, J., in the same case, 2 H. & C. 197, 198.

For a typical statute under which these cases arise, see 38 & 39 VICT., ch. 55, § 144.

[10] With respect to chartered cities, it is generally held that they are liable to private suit for failure to repair streets, on the theory that the valuable rights conferred by charter are a consideration for the duty undertaken. Weet *v.* Brockport, 16 N. Y. 161; Browning *v.* City of Springfield, 17 Ill. 143; Weightman *v.* City of Washington, 1 Black 39; Galveston *v.* Posnainsky, 62 Tex. 118. *Contra*, Detroit *v.* Blakeby, 21 Mich. 84; Pray *v.* Jersey City, 32 N. J. L. 394; French *v.* Boston, 129 Mass. 592. See Hill *v.* Boston, 122 Mass. 344, and collection of cases in 20 L. R. A. N. S. 518. The extent of this liability of municipalities, beyond the duty as to streets, is treated in 25 HARV. L. REV. 646.

[11] See n. 10.

[12] There is a tendency to hold a contractor for failing to repair a roadway in cases where he had contracted to do so for a city. Rockford City *v.* Matthews, 44 La. Ann. 559, 11 So. 818; Brooklyn *v* . Brooklyn City R. Co., 47 N. Y. 475; Terminal Co. *v.* Springer, 47 Ind. App. 35, 93 N. E. 707.

These cases proceed on the ground that the contract is made for the general public, the contractor assuming the duty of the city or county which engages him. In view of the fact that a city may not by delegation be relieved of liability for defects in the highway where it is otherwise liable for them, it is difficult to see how such an intention can be found. See 15 HARV. L. REV. 485, 486.

[13] Solberg *v.* Schlosser, 20 N. D. 307, 127 N. W. 91, where the contractor was held for misfeasance such as described, although the county would not have been liable had it been doing the work itself.

[14] The case followed a former decision in the same jurisdiction. Schneider *v.* Cahill, 127 S. W. 143, which appears to be on all fours with the principal case, except that the distinction between misfeasance and non-feasance was not raised.

doctrine of the Kentucky court, which puts a premium on carelessness and inefficiency. However sound the policy of immunity for the county, it is submitted that the reasons therefor do not require that our highways be filled with a large class of civilly irresponsible individuals.

THE CONSTITUTIONALITY OF A STATUTE DISPENSING WITH INDICTMENT ON PLEA OF GUILTY. — The problem of the prisoner who wishes to plead guilty and have his sentence begin at once, but who must wait several months for the required indictment by grand jury, has been met in Pennsylvania by a recent case sustaining a statute which allows the criminal to enter a plea of guilty and receive sentence without indictment. *Commonwealth ex rel. Stanton* v. *Francies*, 95 Atl. 527 (Pa.). The state constitution provides that "no person shall, for any indictable offense, be proceeded against criminally by information." The court considered that "information," as used in the constitution, adopted in 1790, referred to the peculiarly objectionable proceedings, used at one time in England, whereby one might be bound over for trial without any preliminary hearing, at the arbitrary whim of the prosecutor.[1] Consequently the statutory proceeding in Pennsylvania, providing a hearing of both sides and committal by a magistrate, was held not to fall within the constitutional prohibition. Although this construction is a reasonable one,[2] it is not altogether free from doubt in view of the frequent interpretation of the term "information" as referring simply to prosecution without indictment by grand jury.[3]

Apart from a question of constitutional construction, the case is supportable on another ground. The analogous constitutional provision of trial by jury has generally been treated as a privilege of the defendant's, and subject to waiver by him, where there is a statute permitting waiver, and conferring jurisdiction upon the court to try the issue.[4] This seems to be true even when the provision of the constitution is

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[1] The information had many oppressive features. The frequent use of it for libel increased its unpopularity. An information could not be quashed on motion without trial. The penalty was often divided with the informer. See 3 BACON, ABR., 6 ed., 635; 14 VINER'S ABR., 2 ed., 406, 414.

[2] See 7 DANE'S ABR., 282, § 5.

[3] "An information is defined to be a declaration or statement without being made on the oath of the grand jury, whereby a person is charged with the breach of some public law." State *v.* Ledford, 3 Mo. 75, 77. See People *v.* Sponsler, 1 Dak. 289, 298, 46 N. W. 459, 462; Clepper *v.* State, 4 Tex. 242, 246. The term has been so defined in a Pennsylvania case. See *Respublica v.* Wray, 3 Dallas 490; EDWARDS, GRAND JURY, 34. It is interesting to compare with the argument of the court in the principal case that the constitution forbids the old English practice, the conclusion of the Missouri court that the same constitutional provision merely adopts the common-law use of the information in England, so that only felonies require indictment, and even serious misdemeanors may be prosecuted by information, if the legislature chooses to take them out of the class of indictable offenses. State *v.* Ledford, 3 Mo. 75; State *v.* Cowan, 29 Mo. 330; State *v.* Ebert, 40 Mo. 186.

[4] State *v.* Worden, 46 Conn. 349; *Re* Staff, 63 Wis. 285, 23 N. W. 587. Some courts do not require the statute. State *v.* Stevens, 84 N. J. L. 561, 87 Atl. 118. See 21 HARV. L. REV. 212. A constitutional provision requiring trial in the county of the crime may also be waived. State *v.* Albee, 61 N. H. 423.